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E. G. Trimble

University of Kentucky

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Search and Seizure Under the Fourth Amendment As Interpreted by the United States Supreme Court*

By E. G. TRIMBLE**

After the confused period of prohibition enforcement some of the principles in regard to search and seizure laid down during that period continued to call for interpretation and application.

In *Scher v. United States*¹ the principle of the *Carroll* case was again involved. The charge in this case was the possession and transportation of liquor which lacked the revenue stamps required by the Liquor Taxing Act of 1934. Federal officers had received confidential information which they thought reliable that about midnight on December 30, 1935 a Dodge automobile with a specified license number would transport untaxed liquor from a certain house in Cleveland. On the night of December 30th Federal officers watched the house. About 9:30 P.M. the car appeared in front of the house; a man with a package and three women from the house entered the car and drove away; shortly before midnight the car appeared at the rear of the house, its lights were put out, and it remained for about half an hour. The officers heard what seemed to be heavy paper packages passing over wood; doors slammed and someone drove away in the car which appeared to be heavily loaded. The officers followed in another car for several blocks when the car in front turned into a garage a few feet back of petitioner's house and within the curtilage. One of the officers followed the car into the garage and as petitioner got out the officer told him he understood the car contained liquor. Petitioner replied he had in the trunk, "just a little for a party." The officer opened the trunk and found eighty-eight bottles of untaxed liquor. He arrested petitioner and seized the liquor and the car. The officers had no warrant of any kind. At the trial in the lower court counsel for the defense in order to determine whether there was probable cause undertook to ques-

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** Professor of Political Science, University of Kentucky, Lexington. A.B., Berea College; Ph.D., Yale University; Member of Kentucky Bar.

¹ 305 U.S. 251 (1938).

tion the officers relative to the source of their information which caused them to observe petitioner's conduct. Objections to these questions were sustained. Counsel also moved to suppress all the evidence obtained by the search and to have the seized articles returned on the ground that the search was illegal. It was argued also that since the car was searched in the garage there was in effect a search of the garage itself and that the officer was a trespasser. On these contentions petitioner was overruled and he was convicted. He appealed from the rulings of the lower court.

In a brief unanimous opinion the Supreme Court sustained the lower court's rulings. The opinion said that public policy forbade disclosure of an informer's identity "unless essential to the defense" which was not considered to be true here. "The legality of the officers action" it said, "does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence."² Considering the doctrine of the *Carroll* case, followed in *Husty v. United States*,³ and "the application of this to the facts there disclosed," the opinion continued, "it seems plain enough that just before petitioner entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest. . . . Passage of the car into the open garage closely followed by the observing officer did not destroy this right. No search was made of the garage. Examination of the automobile accompanied an arrest, without objection and upon admission of probable guilt."⁴

Deciding this case by applying the rule followed in the *Carroll* and *Husty* cases seems a little strange. It will be recalled that in the *Carroll* case the search of an automobile without a warrant was permitted on "probable cause." The facts on which probable cause was established were either presented in evidence in court or taken judicial notice of by the court. In the *Husty* case, where the officers were tipped off by telephone calls, the accused, Husty, was known to the officers as a notorious bootlegger because of his past convictions; furthermore, his yard and garage were not invaded.

In the instant case it is clear that "probable cause" would

² *Id.* at 254.

³ For discussion of *Carroll* and *Husty* cases, see second installment in 41 Ky. L. J. 388 (1953).

⁴ *Supra* note 2 at 255.

have to be shown, and that had been defined as facts "sufficient to lead a reasonably discreet and prudent man to believe liquor is illegally possessed in the automobile to be searched."⁵ But how could the court know that the facts justified such belief without knowing the source of the officers' information? The original information of the officers might have been pure suspicion or deliberate falsehoods by prejudiced people. Besides, as far as the record indicates the person who was to transport the liquor was not named by the informant and hence he was not known by the officers as a law violator as were *Husty* and *Carroll*. The Court ignored that aspect of the case and said the legality of what the officers did depended "upon what they saw and heard." What did they see and hear? They saw a man with a package and three women come out of the house, get in the car and leave. There would not seem to be anything very incriminating in that. The officers did not know any of the people involved. Later they saw the car at the house again and heard, in the dark presumably, that it was being loaded with something. It might have been something perfectly legitimate. The fact that it turned out to be liquor is beside the point. A search is not justified by what is found but must be justified in advance.⁶ Yet the Court said that the officers could have stopped the car before it turned into the garage and have made search and put the occupant under arrest. This would seem to reduce "probable cause" to a meaningless term and to leave everything to the judgment of the officer. Would a judge have issued a search warrant on the basis of what the officers saw and heard?⁷ Since the car could have been stopped and searched and the occupant arrested before it entered the garage, according to the court, the right to search it would presumably not be destroyed by its having gone into the garage. If the premise be granted—that is, that search before entering the garage would have been legal—then the conclusion would be justified. But if the premise is unsound the conclusion is also, and the officers were trespassers. And it seems questionable also that the opinion was sound in saying a search was made of the car but not of the garage. If the car had not been trailed into the garage but the officers had come and entered it in order to search the car would

⁵ *Husty v. United States* 282 U.S. 694, 701 (1930).

⁶ *Byars v. United States*, 273 U.S. 28, 29 (1927).

⁷ *Cf. Grau v. United States*, 287 U.S. 124 (1932).

they not be considered as having searched the garage too? Furthermore the Court's statement that "examination of the automobile accompanied an arrest, without objection and upon admission of probable guilt," is subject to question. The correct sequence would seem to be that the car was searched, liquor found, and the arrest followed; if the search was illegal the arrest would be also. Nor is it reasonable to assume that the petitioner in submitting "without objection" to search and in admitting the possession of liquor which he knew the officer was about to find actually assented to the procedure in such a way as to make an otherwise illegal proceeding a legal one.⁸

In such a case as this of course the problem is one of harmonizing private rights and public interest and the Court had repeatedly said that the Fourth Amendment should be liberally construed to protect the individual's right. It seems clear this was not done here. And one of the surprising things about the case is that Justice McReynolds who wrote a vigorous dissent in the Carroll case wrote the Court's opinion here.

Following the decision of the Supreme Court in 1927 in *Olmstead v. United States* that tapping a person's telephone wire outside his office to get evidence to be used against him in a criminal prosecution was not a violation of the Fourth Amendment, Congress passed the Communications Act of 1934 specifically prohibiting further wire-tapping. Section 605 of the Act provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person."⁹

The scope and meaning of this section have been involved in a number of cases which have reached the Supreme Court. Some of these cases did not raise constitutional issues but rather involved largely questions of statutory interpretation. The decisions do throw light though on the Court's philosophy regarding the principle of the Fourth Amendment.

In the first of these cases, *Nardone v. United States*,¹⁰ the Court had before it a conviction of several defendants, on a charge of

⁸ Compare, *Amos v. United States*, see first installment 41 Ky. L. J. 196, 209 (1953); also *Johnson v. United States* *infra*.

⁹ 47 U.S. Sec. 605.

¹⁰ 302 U.S. 379 (1937).

fraud of the revenue laws by smuggling, possessing, and concealing of alcohol. Over objections, the lower courts had permitted federal agents to testify as to the interstate telephone messages of the defendants, constituting a vital part of the proof, obtained by the agents' tapping defendants' wires. In an opinion written by Justice Roberts the Court took the view that Section 605 of the Communications Act prohibited both the interception of the messages and the divulgence of their contents in court. It was argued that the section should be so interpreted as not to include federal agents in the term "person," on the theory that Congress could not have intended to hamper the activities of the government in the detection and punishment of crime. To this argument the Court said, "the answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."¹¹ To the contention that statutes applied to private individuals and not to officials unless the contrary was clearly intended, which was the basis of a dissent by Justices Sutherland and McReynolds, the opinion pointed out the limited scope of that principle and said the correct principle to apply here was "that the sovereign is embraced by general words of a statute intended to prevent injury and wrong."¹² The conviction below therefore was reversed and the case sent back for a new trial.

Conviction resulted at the second trial and the case came back to the Supreme Court¹³ on the question whether the trial court had improperly refused to allow the accused to examine the prosecution as to the uses to which it had put the information which the Supreme Court excluded in the first case. In the second case the Circuit Court had ruled that Congress had not "made incompetent testimony which had become accessible by the use of unlawful 'taps,' for to divulge that information was not to divulge an intercepted telephone talk".¹⁴ In short the question in the second case was whether Section 605 should be interpreted narrowly so as to prohibit the introduction into evidence of intercepted telephone conversations themselves, leaving the prosecu-

¹¹ *Id.* at 383.

¹² *Id.* at 384.

¹³ 308 U.S. 338 (1938).

¹⁴ *Id.* at 339.

tion free to make every other use of the proscribed evidence or whether the section should be interpreted so as to prevent indirect use of the evidence also.

Justice Frankfurter wrote the opinion for the Court. He began by saying that the exclusion of any logically relevant evidence in a criminal prosecution "must be justified by an over-riding public policy expressed in the Constitution or the law of the land." In such a case as this, he said, "two opposing concerns must be harmonized; on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by constitution and laws but capable of infringement either through zeal or design."¹⁵ The result of the holding below, he said, was "to reduce the scope of Section 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve." Such a reading of the statute he pointed out "would largely stultify" the policy laid down in the first case for in that case the Court had found that Congress had outlawed wiretapping "because inconsistent with ethical standards and destructive of personal liberty." He went on to say, "to forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods condemned." He then quoted approvingly what Justice Holmes had said in the *Silverthorne Lumber Company* case "that the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."¹⁶ The decision of the lower court was therefore reversed.

In *Weiss v. United States*¹⁷ a number of individuals were indicted for using the mails to defraud and were convicted largely by the use of intercepted telephone conversations of an *intrastate* nature. The Court held that in Section 605 the words "any communication" included intrastate as well as interstate messages and that since Congress "has power, when necessary, for the protection of interstate commerce, to regulate intrastate transactions, there is no constitutional requirement that the scope of the statute be

¹⁵ *Id.* at 340.

¹⁶ *Id.* at 341.

¹⁷ 308 U.S. 321 (1939).

limited so as to exclude intrastate communications.”¹⁸ Three of the defendants pleaded guilty and testified for the prosecution after being confronted with stenographic or phonographic records of their conversations. The government argued that this constituted authorization by the sender for interception and divulgence of the communications within the meaning of the statute. The Court rejected this position as untenable and said “the act contemplates voluntary consent and not enforced agreement to publication. The participants were ignorant of the interception of the messages and did not consent thereto.”¹⁹

These cases were followed by *Goldstein v. United States*²⁰ which raised the question whether records of telephone conversations to which the complainant was not a party and which were intercepted in violation of the communications act could be used against him. This was another mail fraud case against a number of defendants and involved the use by the government of intercepted telephone conversations of Messman and Garrow, two of the defendants. These defendants on being confronted with the stenographic record of their telephone conversations confessed and turned state’s evidence. There was a number of assignments of error in the appeal but the Supreme Court found all of them without merit except the one regarding the testimony of Messman and Garrow. The question was stated as follows:

“Assuming the witnesses’ testimony was induced by divulging to them the contents of intercepted telephone messages, was the admission of this testimony erroneous?”²¹ This, it will be noted, is the same question which arose in the second *Nardone* case above except that in that case the senders of the messages did the objecting while here the objector was a third party. The opinion, written by Justice Roberts, assumed that the interception was unlawful and that the messages were used “to persuade the witnesses to testify.” He pointed out that the Court had previously held that the purpose of the Fourth Amendment could not be circumvented by the indirect use against the victim of evidence obtained by violating the Amendment. The question now was whether this should be extended to violations of the Communications Act in

¹⁸ *Id.* at 327.

¹⁹ *Id.* at 330.

²⁰ 316 U.S. 114 (1942).

²¹ *Id.* at 117.

behalf of a party not a party to the intercepted conversations. He said no court had ever gone so far in interpreting the Amendment itself and that, although the Supreme Court had never passed on the question, a number of decisions by lower federal courts had "denied standing to one not a victim of an unconstitutional search and seizure to object to the introduction of that which was seized." "We think," he continued, "no broader sanction should be imposed on the government in respect of violation of the Communications Act."²² It had been pointed out by petitioner that Section 605, in addition to prohibiting intercepting and divulging the content of communications without the consent of the sender, provided that

no person having received such intercepted communication or having become acquainted with the contents . . . knowing that such information was so obtained, shall divulge or publish the existence, contents, etc. . . . thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto.

Petitioner argued therefore that the federal officers violated the Act by making "use" of the evidence and that petitioner had standing to object to such use. The government maintained that this "use for benefit" argument did not apply to federal officers in securing evidence but was intended to prevent use for personal advantage of the user. But the Court felt it did not need to pass on the government's contention. Justice Roberts merely said:

We are of the opinion, that even though the use made of the communications by the prosecuting officers to induce the parties to them to testify were held a violation of the statute, this would not render the testimony so procured inadmissible against a person not a party to the message. This is the settled common law rule.²³

The opinion closed by pointing out that "there was no use at the trial of the intercepted communications themselves, or of any information they contained as such" and said that, "if such use as occurred here (their use to induce other evidence) is a violation of the Act, the statute itself imposes a sanction."

Justice Murphy wrote a dissenting opinion for himself, the

²² *Id.* at 121.

²³ *Id.* at 122.

Chief Justice and Justice Frankfurter. (Justice Jackson took no part in the case). In his dissent Justice Murphy took the position that the Court's decision in the second *Nardone* case should control in this case. He said that in that case "We held the policy of Section 605 required the exclusion not merely of the intercepted messages but also of the other evidence acquired through their unlawful use. Otherwise the broad purpose of the statute to outlaw practices inconsistent with ethical standards and destructive of personal liberty would have been largely defeated."²⁴ He then took the position that the fact that the petitioner was not a party to the intercepted messages called for no different legal result. "While the sender can" he said, "render interception, divulgence, or use lawful by his consent, it is a complete non sequitur to conclude that he alone has standing to object to the admission of evidence obtained in violation of Section 605."²⁵ He went on to say "it is immaterial, for the object to be served by that section, whether objection is made by the one sending the communication or by another who is prejudiced by its use." The rule that evidence so obtained was inadmissible was not a remedy for the sender but "it is the obedient answer to the Congressional command that society shall not be plagued with such practices as wire-tapping."²⁶ He then referred to Justice Holmes' statement in the *Silverthorne Lumber* case to the effect that the essence of the rule of the Fourth Amendment was that such illegal evidence could not be used at all, and said the decisions of lower federal courts that only the victim of a search and seizure contravening the Fourth Amendment could object to the use of the evidence did not furnish a proper analogy, because the statute forbade "all interception, divulgence, or use by any person without the consent of the sender." The statement by the majority that the evidence was not inadmissible because the act provided a penalty for violation of Section 605 was, he said "a direct repudiation of both the *Nardone* cases and the *Weiss* case." He concluded by saying that "When Congress condemned the 'use' of lawlessly intercepted communications, the last thing it intended to sanction was the use of such interceptions in a court of justice."²⁷

²⁴ *Id.* at 126.

²⁵ *Id.* at 126.

²⁶ *Id.* at 127.

²⁷ *Id.* at 128.

The difference between the majority and the minority views was a difference of statutory interpretation that involved the constitutional philosophy of the members of the court. What the statute said was clear enough, and the Court had held in the second *Nardone* case that the use of illegally intercepted evidence to obtain other evidence was a violation of the Communications Act when the accused party who was making the complaint was a party to the messages. This was done on the theory that Congress intended to outlaw "unethical practices." If Congress so intended why should such practices be permitted by the Court merely because the complaining party was not a party to the messages, especially since Congress did not indicate that it intended any such exception.

The majority opinion seized upon an old common law rule which greatly narrowed a public policy laid down by Congress. Congress would certainly seem to have the constitutional authority to change a common law rule as far as the federal courts are concerned. This ruling is in sharp contrast with what the Court did in the *Weeks* case.²⁸ In that case, it will be recalled, the Court deliberately departed from the common law rule that a court would not look into the methods by which evidence was obtained and read into the Fourth Amendment the principle that evidence obtained by an illegal search and seizure could not be used. In the instant case it moved in the opposite direction and used the common law rule to limit and partially defeat a congressional policy designed to prevent practices "inconsistent with ethical standards and destructive of personal liberty" and, in effect, to enlarge the scope of the Fourth Amendment.

A slightly different but related question came before the Court at the same session, as the above case. In *Goldman v. United States*²⁹ petitioners Martin, Goldman and Shulman were tried and convicted for a conspiracy to violate the Bankruptcy Act. Two federal agents with the assistance of the building superintendent obtained access at night to Shulman's office and attempted to install a hearing apparatus in the wall of the office with a wire extending into an adjoining room where the agents expected to hear and record Shulman's conversation with Goldman and one

²⁸ For discussion, see First Installment 41 Ky. L. J. 196 at 205 (1953).

²⁹ 316 United States 129 (1942).

Hoffman, the latter acting in collusion with the agents. The hearing apparatus did not work the next day, however, and the agents attached to the wall of the room a detectaphone and overheard and made a record of the conversations in Shulman's office and also of a telephone conversation which Shulman engaged in. Before trial the petitioners on learning of what had happened moved to have the evidence suppressed on the ground that knowledge of the telephone conversation had been obtained in violation of Section 605 of the Communications Act and that knowledge of the office conversation among the three men had been obtained in violation of the Fourth Amendment. The lower court admitted the evidence and the Supreme Court speaking through Justice Roberts affirmed. The opinion after disposing of a preliminary question, took up the matter of listening to the telephone conversation which it said did not violate the Act. Justice Roberts said that there was neither a communication or an interception within the meaning of the statute. He then made this rather surprising statement, "The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation."³⁰ It would seem clear that it was the secrecy of the conversation which was to be protected. This seems also to be understood by Justice Roberts for after quoting Section 3 of the Act he said, "What is protected is the message itself throughout the course of its transmission." Written words to be sent by telegraph did not become a communication under the statute until they were given to an agent of the telegraph company, he said, and "words spoken in a room in the presence of another into a telephone receiver do not constitute a communication by wire within the meaning of the section."³¹ It is difficult to see why talking into a telephone receiver is not a communication. If it is not at the time, when does it become such? Is it after the human voice has left the office of the speaker? Unlike the words of a telegram before delivery to the telegraph company, nothing more is to be done to make the words spoken into a telephone a communication. The receiver is part of the transmission apparatus and receipt at the other end of the line is instantaneous. In this case reception at the other end of the wire no doubt occurred be-

³⁰ *Id.* at 133.

³¹ *Id.* at 133.

fore the sound penetrated the wall and was picked up by the government agents. But Justice Roberts said that interception "indicates the taking or seizure by the way or before arrival at the destination," and that it did "not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender or after, or at the moment it comes into the possession of the intender receiver."³² It is submitted that this statement implies the passage of more time between the speaking of the words and their reception at the other end than is true in fact or than is legally sound.

The opinion then considered whether the trespass in the office of Shulman made the use of the detectaphone illegal. It said that it did not because the trespass was made in connection with the installation of the hearing apparatus which failed to function and "the relation between the trespass and the use of the detectaphone was that of antecedent and consequent." It accepted the finding of the lower courts that "the trespass did not aid materially in the use of the detectaphone."³³ The most important question was whether the use of the detectaphone violated the Fourth Amendment. It was argued by the defense that the case could be distinguished from the *Olmstead* case because in the latter the Court had said that in using the telephone the speaker projected his voice beyond his office and assumed the risk that it would be overheard, while in the present case the speaker did not intend for his voice to go beyond his office. This distinction the Court said was "too nice for practical application of the constitutional guarantee,"³⁴ and that "no reasonable or logical distinction" could be drawn between the cases. It refused also petitioners alternative request that it overrule the *Olmstead* case.

Justice Murphy wrote a short dissent in which he admitted that if the Amendment "were given only a literal construction, it might not fit the case" before the court, but he endorsed the view that Justice Holmes took in his dissent in the *Olmstead* case. It is believed a few of his statements merit quoting because of the importance of the conflict between the literal interpretation of the

³² *Id.* at 134.

³³ *Id.* at 135.

³⁴ *Id.* at 135. In *Olmstead v. United States* the court held that tapping a telephone wire did not constitute a physical search of an office and hence did not violate the Fourth Amendment. See second installment 1 Ky. L. J., p. 407 (1953).

Fourth Amendment adopted by the majority in the *Olmstead* case and here, and the interpretation based on principle taken by Justice Brandeis in the former case and Justice Murphy in this case. Justice Murphy said:

The conditions of modern life have greatly expanded the range and character of those activities which require protection from intrusive action by government officials if men and women are to enjoy the full benefit of that privacy which the Fourth Amendment was intended to provide. It is our duty to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation.³⁵

He then noted that physical entry may be wholly immaterial, for

the search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment. . . . Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone . . . or by new methods of photography that penetrated the walls or overcome distances the privacy of the citizen is equally invaded.³⁶

He then pointed out the results of the literal interpretation which required a physical entry and search before the Amendment was violated, and said,

It is strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper but allows the revelation of thoughts uttered within the sanctity of private quarters, thoughts perhaps too intimate to be set down even in a secret diary, or indeed, utterances about which the common law drew the cloak of privilege—the most confidential revelations between husband and wife, client and lawyer, patient and physician, a penitent and spiritual adviser.³⁷

This difference in interpreting the Amendment is of course fundamental. If the principle be accepted that the privacy of the individual should be respected it would not seem to be very im-

³⁵ *Id.* at 138.

³⁶ *Id.* at 139.

³⁷ *Id.* at 141.

portant how the invasion of that privacy is accomplished. Justice Bradley had said in the *Boyd* case³⁸ that the breaking of the doors and rummaging of drawers did not constitute the essence of the offense, and warned that a close and literal construction deprived the Amendment of half its efficacy.³⁹

In *Davis v. United States*⁴⁰ the Court had before it a case involving the enforcement of price control during World War II. Davis was convicted for the misdemeanor of illegally having in his possession gasoline ration coupons. He claimed that the evidence used against him was obtained by an illegal search and seizure. Davis was president of an Auto Laundry Corp. which was suspected of running a black market in gasoline. Federal agents went without warrants of any kind to a place near his service station and watched it for several hours. Two of the agents finally drove their cars into the station and purchased gasoline without coupons from an attendant by paying above ceiling prices. The station attendant said she was selling under Davis' instructions. The agents arrested her for selling above ceiling prices and without securing coupons. While they were making the arrest Davis drove into the station and was also arrested on the same charges. The agents demanded and received from him the keys to tin boxes attached to the gasoline pumps in which ration coupons were kept. The coupons found were not sufficient to cover the amount by which the capacity of the storage tanks had been diminished by sales. Two of the agents went with Davis into the waiting room which was adjoined by an inner office the door to which was locked. The agents demanded that Davis open the door. This he refused to do although he maintained that he had coupons in that room to make up the discrepancy between the amount of coupons found outside and the amount of gasoline on hand. One agent testified that he did not try to convince Davis that he ought to open the door but told him "he would have to open that door." Another agent went outside and with a light looked through the window and tried to open it. When Davis saw the agent trying to open the window he said "He don't need to do that I will open the damn door." He testified that he did so because the agents

³⁸ See first installment 41 Ky. L. J. 186 at 200 (1953).

³⁹ Justice Jackson did not participate in the case and Chief Justice Stone and Justice Frankfurter stated that they would have joined in overruling the *Olmstead* case which they thought was indistinguishable.

⁴⁰ 328 U.S. 582 (1948).

threatened to break down the door. The illegally possessed coupons were found in a filing cabinet in the inner room. The District Court found that Davis had voluntarily consented to the search and seizure. The Circuit Court of Appeals did not disturb that finding but expressed some doubt about it. It upheld the conviction on the theory that the search and seizure was incidental to a lawful arrest and hence was reasonable. The law made it a misdemeanor to sell gasoline at above ceiling prices or to sell it without coupons. It was for these offenses that Davis was arrested and his place searched but he was not prosecuted for these offenses. It was some six weeks later that he was arrested, tried, and convicted for the offenses of illegally having in his possession the coupons found in the inner office. The Supreme Court, could then, conceivably uphold conviction on either of two grounds, that the search and seizure was justified as incidental to a lawful arrest, or that Davis had voluntarily consented to the search. It chose the latter ground together with the nature of the documents to uphold conviction. Justice Douglas wrote the opinion for the Court.

Justice Douglas took the view that the papers seized were government property; hence the rule applicable to the seizure of private papers did not apply. He said, citing statutory authority, that the "ration coupons never became the private property of the holder but remained at all times the property of the government and subject to inspection and recall by it."⁴¹ He then quoted as authority from the opinion in *Wilson v. United States* to the effect that

In the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. . . . The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained. The

⁴¹ *Id.* at 588.

fundamental ground of decision in this class of cases, is that where . . . the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.⁴²

"The distinction" Justice Douglas said, "is between property to which the government is entitled to possession and property to which it is not."

He disavowed any intention of saying that the government could "proceed lawlessly and subject to no restraints" or "that the right to inspect under the regulations subjects a dealer to a general search of his papers." "The nature of the coupons," he said, "is important here merely as indicating that the officers did not exceed the *permissible limits* of persuasion in obtaining them."⁴³ And at another place he said "where the officers seek to inspect public documents at the place of business where they are required to be kept, *permissible limits of persuasion* are not so narrow as where private papers are sought. The demand in one of right." He repeated a number of times that the search occurred "at the place of business," not at petitioner's home. He closed his opinion by pointing out that the District Court found that the agents talked Davis into permitting the inspection of the coupons and stated "We cannot say as a matter of law that that finding was erroneous."⁴⁴

Justice Frankfurter, with Justice Murphy, dissented in an opinion which differed fundamentally with the Court's opinion, and therefore merits consideration. He pointed out that Congress had not attempted to authorize the seizure by warrant of such documents for a misdemeanor and that *Gouled v. United States*⁴⁵ made it illegal to seize them under judicial authority. He said the Court's holding that they could be seized without a warrant because the gasoline business was regulated amounted to holding that "a search which could not be justified under a search warrant is lawful without it." Surely, he thought, the Constitution did not mean "to make it legally advantageous not to have a war-

⁴² *Id.* at 590.

⁴³ *Id.* at 591.

⁴⁴ *Id.* at 593.

⁴⁵ See first installment 41 Ky. L. J. 196 at 207 (1953).

rant, so that the police may roam freely.”⁴⁶ He admitted that there was a difference between private papers and those in which the public had an interest. Private papers could not be seized under legal process while public papers could be seized but “only upon a properly safeguarded search.” “Had the coupons in controversy been secured by a proper search they could be used against the defendant at the trial,” he said, but “their character does not eliminate the restrictions of the Fourth Amendment. . . .”⁴⁷ The Court’s opinion he continued had “only its own reasoning to support it” and pointed out that *Wilson v. United States*, relied on by the Court, “concerned the difference between the amenability of a corporation to testimonial compulsion and the immunity of an individual . . . to be free from the duty to give testimony.”⁴⁸

He then reviewed the historical meaning of the Fourth Amendment and concluded that in the mind of the framers of the Constitution “all seizures without judicial authority were deemed ‘unreasonable’.” In support of this he quoted from a decision of the Supreme Court of Massachusetts interpreting the provision of that state’s constitution on which the Fourth Amendment was based. The Massachusetts court said “This article does not prohibit all search and seizures of a man’s person, his papers and possessions . . . ; but such only as are unreasonable and the foundation of which is not previously supported by oath or affirmation.”⁴⁹ In the instant case Justice Frankfurter said “no attempt was made to get a search warrant because none could have been got.” He then reviewed the former decisions of the Court and said that “with a deviation promptly retraced” they had “reflected the broad purpose of the Fourth Amendment.” The lower court had relied chiefly on *Marron v. United States* but “the sting of the *Marron* case was taken by two later cases,” he said, citing the *Go-Bart* and *Lefkowitz* cases. Having reached the conclusion that the search and seizure could not have been authorized by a court he considered whether they could be justified without a warrant under some of the exceptions to the common law. One of these exceptions was the right to seize without warrant goods on moving vehicles; another was the right to search the person upon arrest.

⁴⁶ 328 U.S. 582 at 595.

⁴⁷ *Id.* at 602.

⁴⁸ *Id.* at 603.

⁴⁹ *Commonwealth v. Dana* 2 Met. (Mass.) 329; quoted *Id.* at 605.

This latter right he thought the Court had kept within narrow limits except in the *Marron* case which he repeated had been displaced by the *Go-Bart* and *Lefkowitz* cases. He insisted that it was important to keep clear the distinction between a prohibited search and an illegal seizure. One of these could be legal and the other illegal under certain circumstances.⁵⁰

He gave attention also to the District Court's finding which was affirmed by the Supreme Court, that Davis had voluntarily consented to the search. He said "one must reject the District Court's finding that Davis' consent went with his surrender of the documents unless one is to hold that every submission to the imminent exertion of superior force is consensual if force is not physically applied,"⁵¹ and cited *Amos v. United States* where the Court held there was "implied coercion" under similar circumstances. He commented on the Court's finding voluntariness because it was ration coupons that were demanded by saying that "to make voluntariness turn on the nature of the quest, instead of on the nature of the response of the person in control of the documents, is to distort familiar notions on the basis of which the law has heretofore adjudged legal consequences."⁵²

He closed by pointing out that Davis was arrested first for the selling of gasoline above ceiling prices and for not securing coupons. For neither of these offenses were "coupons instruments of the crime" in any proper sense, and the right to search on arrest, he said, extended only to the articles necessary to the commission of the crime for which arrest was made. He then pointed out that the offense of possessing illegal coupons for which Davis was later arrested and tried was a misdemeanor for which arrest without a warrant could be made only if the offense was committed in the presence of the officers; but said that prior to the search, the "officers had no basis for stating that he was committing the crime of illegal possession of the coupons in their presence."⁵³ Justice Rutledge wrote a brief dissent also, and Justice Jackson did not participate in the decision.

⁵⁰ Cases cited were: *Gouled v. United States* 255 U.S. 298; *Amos v. United States* 255 U.S. 313; *Byars v. United States* 273 U.S. 28; *Taylor v. United States* 286 U.S. 1.

⁵¹ 328 U.S. 582 at 599. See first installment, 41 Ky. L. J. 209 (1953) for discussion of *Amos v. United States*.

⁵² *Id.* at 600.

⁵³ *Id.* at 614.

It seems clear that judged by previous decisions the majority opinion had very feeble support. Whether the decision was sound in spite of that fact is a question on which honest and patriotic people may differ as is shown of course by the Court's division. It could be argued that since gasoline was rationed, the coupons being government property, and since the government reserved the right to inspect them, there was no unreasonable search and seizure. Such a position though runs counter to the basic principle of the Fourth Amendment, namely, that a judicial officer, not a policeman, should decide when and to what extent a search should be resorted to. It seems clear also that the opinion of the Court confused two different principles—that Davis voluntarily agreed to the search and seizure; and that the officers could search as a matter of right because the coupons were government documents. If Davis voluntarily permitted the search it would seem to make no difference about the nature of the documents; presumably one can always permit his house or office to be searched. If, on the other hand, the search was lawful as a matter of right because of the character of the documents then persuasion was unnecessary. Yet the Court said that because of the nature of the documents the *permissible limits* of persuasion had not been crossed. It would seem clear that the officers either could search and seize as a matter of right or that they could not do so. Furthermore it is difficult to see any voluntary consent here especially when one of the agents testified that he did not try to convince Davis to open the door but told him he had to do so.

The majority opinion relied on the decision in the *Wilson* case, and the opinion in that case does indicate a different attitude toward documents in which the public has an interest and purely private papers. However, it will be recalled⁵⁴ that in that case a subpoena duces tecum had been issued by a court to a corporation and served on Wilson its president to produce the company's books before the grand jury. Wilson pleaded self-incrimination under the Fifth Amendment, not the Fourth, and it was this issue that brought forth the statement used by Justice Douglas in the Court's opinion. In that case judicial process was used; while in the instant case, as Justice Frankfurter repeatedly pointed out, it was police action without judicial authority which the government

⁵⁴ See first installment 41 Ky. L. J. 196 at 213 (1953).

was attempting to justify. Seizing documents with judicial process and without such process Justice Frankfurter correctly said "is the difference between the protection of civil liberties and their invasion."⁵⁵ The confusion in the opinion and its lack of support by previous decisions together with the fact that the opinion did not carry the authority of a majority of the whole Court leave it a very unsatisfactory decision for the future.

On the same day that the above case was decided the Court decided *Zap v. United States*,⁵⁶ in which the petitioner had signed a contract to do some work for the Navy. By the contract the Navy was authorized to examine his books. This was being done by the use of FBI agents. The agents found an incriminating cancelled check which they requested and obtained from petitioner's bookkeeper. The use of this check in a criminal prosecution of petitioner for defrauding the government was challenged by him.

Justice Douglas again wrote the opinion for the majority holding that the use of the check did not violate the accused's rights. Since the petitioner had agreed to have his books inspected and since the inspection was properly done, the search was lawful, and the agents could testify as to any facts obtained by the search. The question was then, he said, "whether the check itself could be introduced at the trial."⁵⁷ He then stated that if "it be assumed in passing that the taking of the check was unlawful, that would not make inadmissible in evidence the knowledge which had been legally obtained" and "had the check been returned to petitioners on the motion to suppress, a warrant for it could have been immediately issued." To forbid the use of the check itself he concluded "would be to exalt a technicality to constitutional levels."⁵⁸

Justice Frankfurter again dissented and was joined by Justices Murphy and Rutledge. He agreed that the government could legally make the search and the inspectors could testify to what they found but he insisted that the "legality of a search does not automatically legalize every accompanying seizure," and cited the *Marron* case where the Court held that police could not seize under a search warrant things not covered in the warrant. He closed by saying, "The fact that this evidence might have been

⁵⁵ 328 U.S. 582 at 602.

⁵⁶ 328 U.S. 624 (1946).

⁵⁷ *Id.* at 625.

⁵⁸ *Id.* at 630.

seized by a lawful warrant seems a strange basis for approving seizure without a warrant. The Fourth Amendment stands in the way."⁵⁹

In *Harris v. United States*⁶⁰ the Court had before it a clearer case of search and seizure incident to a lawful arrest. Five FBI agents with two warrants of arrest for Harris charging the use of the mails to defraud and their use to send stolen property entered his apartment and arrested him in the living room. They then proceeded to search his entire four room apartment in a very thorough manner, primarily for two cancelled checks but according to the agents' testimony for "any means that might have been used to commit these two crimes." No real evidence of the crimes charged in the warrants was found but a number of miscellaneous items such as stationery, pens, hotel bills, etc. were taken. The agents did, however, find in a bureau drawer in the bedroom an envelope marked "George Harris, personal papers" containing eight notices of classification cards and eleven registration certificates with the stamp of a Local Draft Board. He was indicted, tried and convicted with this evidence for unlawful possession, concealment, etc. of these latter documents. He objected to the use of the evidence as having been seized in violation of the Fourth Amendment.

Chief Justice Vinson wrote a comparatively short opinion for the majority upholding the conviction. He began by pointing out that search and seizure as an incident to a lawful arrest was well established in American law, and that the opinions of the Court had frequently recognized that the search could extend "beyond the person arrested to include the premises under his immediate control." In support of this he quoted a dictum from the *Agnello* case as follows:

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.⁶¹

⁵⁹ *Id.* at 633.

⁶⁰ 331 U.S. 145 (1946).

⁶¹ *Id.* at 151; for *Agnello* case, see second installment 41 Ky. L. J. 388 at 397 (1953).

No support he said could be found for the position that the search could not extend beyond the room in which the arrest was made,^{61a} citing the *Agnello* and *Marron* cases as cases which went beyond the room. He pointed out that "Petitioner was in exclusive possession of a four-room apartment," and "his control extended quite as much to the bed room in which the draft cards were found as to the living room in which the arrest was made."⁶² The Court he said had "frequently recognized the distinction between merely evidentiary materials . . . which may not be seized . . . and those objects which may validly be seized" such as instruments of the crime. "The checks and other instrumentalities of the crime charged in the warrants toward which the search was directed as well as the draft cards which were in fact seized fall within that class of objects properly subject to seizure," he concluded.⁶³ He went on to say that "in keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense . . . in the very presence of the agents conducting the search."⁶⁴ It was therefore a reasonable and legal search and seizure and conviction.

Justice Frankfurter again dissented in an opinion concurred in by Justices Murphy and Rutledge. He repeated much of his dissenting opinion in the *Davis* case above pointing out again that under the Fourth Amendment "with minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant."⁶⁵ Exceptions were made when the search was of a moving vehicle or was the exercise of the right to search for and seize on arrest "all that is on the person, or is in such open and immediate physical relation to him as to be in a fair sense a projection of his person."⁶⁶ He challenged the view of the majority that because a man's house and its contents are in his "possession" and "control" for some legal purposes they are also for the purpose of search. "Due regard," he said, "for the policy of the Amendment precludes indulgence in the fiction that the recesses of a man's house are like

^{61a} But see, *People v. Conway* *Infra*, note 88 and *Smith v. Jerome* there cited.

⁶² *Supra* note 60 at 152.

⁶³ *Id.* at 154.

⁶⁴ *Id.* at 155.

⁶⁵ *Id.* at 162.

⁶⁶ *Id.* at 168.

the pockets of the clothes he wears at the time of arrest.”⁶⁷ Even if the search was considered reasonable because the apartment was in the accused’s control he said it did not follow that the seizure was. He pointed out, citing the *Marron* case, that “if the agents had obtained a warrant to look for the cancelled checks they would not be entitled to seize other items discovered in the process.” “The Court’s decision,” he said, “achieves the novel and startling result of making the scope of search without a warrant broader than an authorized search.”⁶⁸ He closed by quoting Justice Leonard Hand as follows: “After arresting a man, in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant.”⁶⁹

Justice Murphy also wrote a separate dissent in which he insisted that the Court’s opinion “converts a warrant for arrest into a general search warrant lacking all the constitutional safeguards,”⁷⁰ and pointed out as did Justice Frankfurter that the agents made no effort to get a warrant to search the apartment although they did get warrants to search petitioner’s office and automobile. “Certainly the constitution is not dependent upon the whim or convenience of law enforcement officers,”⁷¹ he concluded.

Justice Jackson also wrote a short dissent in which he agreed with Justices Frankfurter and Murphy that “no search of premises, as such is reasonable except the cause for it be approved and the limits of it fixed and the scope of it particularly defined by a disinterested magistrate.”⁷² He pointed out the serious implications of the Court’s opinion saying that it apparently would permit such a search even though the arrest be for a petty misdemeanor, permit an officer to choose a man’s residence as the place to make an arrest thus getting the right to search the house, and would leave it to the arresting officer rather than a magistrate to determine the extent of the search to be made. If a search “is allowed to go beyond the person arrested and the objects upon him or in

⁶⁷ *Id.* at 164.

⁶⁸ *Id.* at 165.

⁶⁹ *Id.* at 174; quotation from Judge Hand in *United States v. Kirschenblatt* 16 F. 2d 202, 203.

⁷⁰ *Id.* at 183.

⁷¹ *Id.* at 190.

⁷² *Id.* at 198.

his immediate physical control," he said, "I see no practical limit short of that set in the opinion of the court—and that means to me no limit at all."⁷³

It will be noted that the chief support for the Court's decision was the dictum from the *Agnello* case to the effect that the right of search incident to a lawful arrest extends to the "place" where the arrest is made. It is appropriate therefore to examine the statement and the authorities cited for it.

In the first place it should be noted that the statement spoke of the right to search after the arrest of one "while committing a crime" which was the situation in the *Agnello* case. Harris, however, was not arrested while committing a crime but on charges of a previously committed crime. In the second place the term "place" in the *Agnello* dictum was not defined and, as will be recalled, the decision in the case actually held that the place involved (the house of Agnello) had been illegally searched because it was several blocks away from the scene of the arrest.

As authority for this dictum the Court in the *Agnello* case cited passages in the *Weeks* and *Carroll* cases. The passage from the *Carroll* opinion spoke merely of the right in connection with the lawful arrest of a person to seize "whatever is found upon his person or in his control which it is unlawful for him to have"⁷⁴ and which might be used as evidence. This statement was supported by citing the *Weeks* case, Bishop's work on criminal procedure, and the cases of *Dillon v. O'Brien*,⁷⁵ *Kneeland v. Connelly*⁷⁶ and *Getchel v. Page*.⁷⁷ The passage in the *Weeks*⁷⁸ case referred to dealt merely with the search of the "person" of one arrested. The passage⁷⁹ in Bishop's work referred to is substantially that of the *Agnello* dictum but is itself based upon the above-mentioned cases except the *Weeks* case.

In the *Dillon* case above officers O'Brien and Davis had a warrant for the arrest of Dillon and others on a charge of conspiracy to defraud some tenants. The officers went to Dillon's house,

⁷³ *Id.* at 197.

⁷⁴ 267 U.S. 133 at 158.

⁷⁵ 16 Cox C. C. 245 (1887).

⁷⁶ 70 Ga. 424 (1883).

⁷⁷ 69 A. 624 (1908).

⁷⁸ *Weeks v. U.S.* 232 U.S. 383 at 392 (1914).

⁷⁹ *New Criminal Procedure* by Joel P. Bishop, second edition by H. C. Underhill Vol. 1, Sec. 211, p. 153, Chicago, 1913. Several other cases are cited dealing with different aspects of the problem.

entered through the open door and found Dillon and his fellow conspirators "in furtherance of, and as part of that conspiracy, engaged in receiving rents from certain tenants, and had books and papers in which they were making entries of the receipt of rents, and also a certain telegram, all of which were being used for the purpose of such combination and conspiracy."⁸⁰ The officers arrested the conspirators and seized some banknotes, the books and papers and other property being used at the time. The Judge after reviewing earlier cases and distinguishing *Entwich v. Carrington*, said that officers on the lawful arrest of one "are entitled . . . to take and detain property found in his possession which will form material evidence in his prosecution for that crime."⁸¹ In *Kneeland v. Connelly*⁸² a chief of police having a warrant for the arrest of a gambler entered his place of business and in addition to arresting him seized some tables and roulette wheels used in running the gambling house. Without a discussion of the constitutional aspects of the case the court said the warrant "carries with it the power or legal authority to seize the implements of his crime."⁸³

*Getchell v. Page*⁸⁴ was a Maine case involving a civil action against an officer for trespass for the seizure of some materials used to make liquor under a warrant to search for intoxicating liquor. The liquor was found and seized, the owner was arrested, and other material not covered by the warrant but useful as evidence was also seized. The court upheld the officer's right to seize "the instruments of the crime" and "such other articles as may reasonably be of use as evidence upon the trial."⁸⁵ There was therefore a lawful search under a warrant during which the evidence was found and a lawful arrest made.

In addition to the above cases a number of others have arisen in the states. In Michigan it was held that an officer on arresting a man in his room for homicide by shooting could legally seize a revolver found in a drawer of a sewing machine in the room;⁸⁶ also the same court held that when an officer legally entered a

⁸⁰ 16 Cox C. C. 245 (1887).

⁸¹ *Id.* 249.

⁸² 70 Ga. 424 (1883).

⁸³ *Id.* 429.

⁸⁴ 69 A. 624 (1908).

⁸⁵ *Id.* 626.

⁸⁶ *People v. Cona* 147 N.W. 526 (1914).

house to quell a disturbance and lawfully arrested a drunk man sitting at a table he could "take possession of things in plain sight . . . which are in themselves evidence of the . . . crime for which the arrest is made."⁸⁷ In this case the thing seized was a bottle of whiskey on the table at which the drunk man sat. But the same court held the following year that the right to search was limited to the room in which the arrest was made.⁸⁸ Here the arrest was made under a warrant charging violation of the state liquor law. The sheriff arrested Mrs. Conway in her home and he and his deputies searched the house, finding a bottle of "white mule" under the floor at the head of the stairs. The court held that the warrant gave the sheriff

lawful access only to that part of the house which it was necessary for him to enter in order to serve his warrant. Here, where he was lawfully present he could search for evidence . . . ; but further he could not go without invading the constitutional rights of defendant. He and his deputies did not gain lawful access to that part of the house where the white mule was kept.

The court quoted approvingly the New York case of *Smith v. Jerome*⁸⁹ in which the New York court in upholding the search of defendant's room after his arrest and the seizure of two incriminating letters, said,

The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested.⁹⁰

In addition to the above cases the question had arisen in a number of cases in the lower federal courts. These courts, as Chief Justice Vinson pointed out, seem to have assumed that search need not be restricted to the room in which the arrest was made. The decisions which he cited^{90a} were, however, decided after the *Agnello* and *Marron* decisions and followed them.

⁸⁷ *People v. Woodward* (1922) 190 N.W. 721.

⁸⁸ *People v. Conway* 195 N.W. 679 (1923).

⁸⁹ N. Y. Supp. 202.

⁹⁰ *People v. Conway* 195 N.W. 679 (1923).

^{90a} *U. S. v. Lindenfeld* 142 F. 2d 829 (1944); *Matthews v. Correa* 135 Fed. 2d 534 (1943); *U. S. v. 71, 41 Ounces of Gold* 94 F. 2d 17 (1938).

The cases reviewed above are the most important ones dealing with the right to search the "place" where a lawful arrest is made and incident thereto, prior to the *Marron* case—the second one relied upon by the court.

In the *Marron* case, it will be recalled, the Court permitted the entire suite of four rooms to be searched. This case, however, would seem to have been greatly narrowed if not silently overruled in the *Go-Bart* and *Lefkowitz* cases, as was pointed out by the dissenting Justices in the *Harris* case. Each of these cases ruled out the search of a small office as incident to lawful arrests. Justice Butler who wrote the opinions in them as he did in the *Marron* case emphasized that in the latter case the things seized, the bills and ledger, were being used in the operation of the illegal enterprise, that they were "visible, and accessible, and in the offender's immediate custody."⁹¹

It will be noted that in the cases reviewed above which occurred prior to the *Agnello* and *Marron* cases the "place" the search of which was permitted incident to a lawful arrest only, was in every case the room in which the arrest was made and one of them specifically held, contrary to Chief Justice Vinson's statement, that the search could not extend beyond the room. Also in nearly all of the cases the things seized were in plain view and in the immediate control of the one arrested and no detailed search was necessary.⁹² Furthermore, in *Dillon v. O'Brien*, most relied on as authority, as well as in *Kneeland v. Connelly* and in *People v. Woodward*, the things seized were being used illegally at the time of the seizure. It will be remembered that the dictum in the *Agnello* case referred to the arrest of one "while committing a crime" and in the *Marron* case the Court emphasized the fact that the accused was caught in the act of running the illegal enterprise; in the *Go-Bart* and *Lefkowitz* cases the opinions emphasized that the accused were "not committing a crime when arrested" implying, it would seem, that if they had been that fact would have been significant. It is submitted that this view might well be

⁹¹ *Go-Bart v. United States* 282 U.S. 344, 358. For discussion of these cases see 41 Ky. L. J. 401-3 (1953).

⁹² Exceptions were: *People v. Cona* where a revolver was found in the drawer of a sewing machine but the officer making the arrest had seen the accused shoot the victim with a revolver; *Smith v. Jerome* where the officer searched the accused's room and effects and found the evidence in the coat pockets of the accused.

adopted by the courts as the criterion for the legality of a search and seizure incident to a lawful arrest. If one is found in the act of committing the crime, the propriety of seizing the instruments with which he is committing the offense or the fruits of the offense which are in his active, visible, physical possession could hardly be questioned. This could no doubt be done without the necessity for much search. The only alternative, if any search beyond the person of the one arrested, is to be permitted at all, would seem to be to limit the search to the room in which the arrest is made—a not very satisfactory rule.

From the foregoing discussion it would seem that court decisions prior to the *Harris* case furnished very little if any support for the proposition that officers could in making a lawful arrest for a crime committed sometime previously search an entire apartment or house for evidence of the crime, much less seize evidence of some other crime and use it to prosecute the suspect. The seriousness of the principle laid down in the majority opinion was pointed out by each of the dissenting opinions. It practically nullifies the Fourth Amendment. As Justice Jackson said it permits officers with a warrant to arrest for even a minor offense to choose to make the arrest in the home and thus acquire the right to search the house. That is, indeed, "indistinguishable from what might be done under a general warrant"⁹³ and even a general warrant would have to be issued by a magistrate.

In *United States v. Di Re*⁹⁴ an informer by the name of Reed had reported to an agent of the Office of Price Administration that he was to buy counterfeit gasoline coupons from one Buttitta at a certain place in the city of Buffalo. The agent and a policeman trailed Buttitta's car to the named place where the car was parked. When the officers approached the car the informer was alone in the back seat and had counterfeit coupons which he said he bought from Buttitta, the driver of the car. Without previous information implicating Di Re who was in the front seat with Buttitta and without a warrant the officers arrested and searched him and the driver and found counterfeit coupons on Di Re. With this evidence Di Re was convicted of illegal possession of the coupons. The government defended the search on alternative

⁹³ Judge Learned Hand quoted above, note 65.
⁹⁴ 332 U.S. 581 (1948).

grounds. First, that the search was justified as incident to a lawful arrest; second, that the search of his person was justified as incident to the search of the automobile reasonably believed to be carrying contraband. Justice Jackson wrote the opinion holding the search of *Di Re* unlawful and Justice Black and Chief Justice Vinson dissented without writing an opinion.

In defending the search of *Di Re* as incident to the search of the automobile the government relied upon the ruling in the *Carroll* case. Justice Jackson pointed out that in that case a Congressional statute authorized the search of an automobile without a warrant on probable cause, and that the Court had never held without such statutes that a car could be thus searched. It was not necessary in this case to pass on that question he said because "there appears to have been no search of the car itself."⁹⁵ Assuming though, without deciding, that there was probably cause for searching it he considered the government's argument that such a power should exist as a matter of common sense. He said the government admitted that it would not contend that a warrant to search a residence would authorize the search of people in it, and he thought it would follow that a warrant to search a car would confer no greater authority. If that be so, he reasoned, it could not be maintained that the right to search a car without a warrant conferred greater authority than to search one with a warrant. "We are not convinced," he concluded, "that a person, by mere presence in a suspected car loses immunities from search of his person to which he would otherwise be entitled."⁹⁶

Turning then to the argument of the government that the right to arrest for a federal crime was a matter of federal law and should be determined by a uniform rule, he pointed out that there was no federal statute which laid down a general rule for arrest without a warrant for federal offences but that there was an old federal law which provided that arrests within a state for federal offenses were to be "agreeable to the usual mode of process against offenders in such state." The law of New York, therefore, provided the standard by which the legality of the arrest was to be determined, he said, and under that law an arrest without a warrant could be made for a misdemeanor, only if com-

⁹⁵ *Id.* at 586.

⁹⁶ *Id.* at 587.

mitted in an officer's presence and for a felony only if an officer had reasonable grounds to believe the one arrested had committed it. Di Re had been indicted for the misdemeanor of possessing counterfeit gasoline coupons and Justice Jackson pointed out that the government had conceded that "the only person who committed a possible misdemeanor in the open presence of the officers was Reed."⁹⁷ But on appeal the government had argued that there was probably cause to arrest Di Re for the felony of knowingly possessing counterfeit coupons with intent to utter them as true, and also for the felony of conspiracy under section 37 of the Criminal Code. But Justice Jackson pointed out that the only evidence in the record to justify arrest on either of these grounds was Di Re's presence in the car on the street of a large city in daylight in view of every passerby, and that this failed "to support the inference of any felony at all."⁹⁸ Nor did Di Re's failure to protest his arrest create any inference of probable cause for arrest; he had a right, said the opinion, "to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case."⁹⁹ In closing Justice Jackson pointed out that the Court had previously said a number of times that a search could not be made legal by what is found but the search "is good or bad when it starts and does not change character from its success."¹⁰⁰

In *Johnson v. United States*,¹⁰¹ federal narcotic agents on smelling burning opium in a hotel room knocked on the door, identified themselves, and were admitted by the lone woman occupant. They put her under arrest at once and searched the room finding incriminating evidence. They did not have a warrant of any kind and the question before the Court was the legality of the arrest and of the search. Justice Jackson again wrote the opinion for the majority reversing the conviction in the lower court. He began by saying that entrance was "demanded under color of office and granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right."¹⁰² After saying that odors of burning opium testified to by experts might

⁹⁷ *Id.* at 592.

⁹⁸ *Id.* at 593.

⁹⁹ *Id.* at 594.

¹⁰⁰ *Id.* at 595.

¹⁰¹ 333 U.S. 10 (1948).

¹⁰² *Id.* at 13.

justify a magistrate in issuing a search warrant he said that here "no reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay." Under the circumstances of the case he thought these considerations were not enough "to by-pass the constitutional requirement."¹⁰³ "When the right to privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent,"¹⁰⁴ he said. The government defended the search as incident to the arrest but conceded in effect that there was no right to arrest until the officers had entered the room and found petitioner to be the sole occupant. But since the entry itself was illegal Justice Jackson said the government's position was equivalent to trying to justify the arrest by the search and the search by the arrest which would not do.¹⁰⁵

In *Trupiano v. United States*¹⁰⁶ the Court had an opportunity again to apply the principle laid down in the *Harris* Case. Trupiano, Antoniole and others rented a farm in New Jersey on which they built a barn and established a still. The owner of the farm reported the enterprise to the agents of the Alcohol Tax Unit of the National Government. One of its agents, Nilsen, obtained work on the farm with the men running the still. He reported regularly to his superiors for several weeks. At an appointed time agents descended on the barn and looking through the open doors, saw the still in operation with Antoniole in attendance. They entered, arrested him, and seized the distilling equipment together with 262 five-gallon cans of illicit alcohol. Trupiano was not present but was arrested at a different place. At his trial he challenged the seizure of the equipment because the agents had no warrant of any kind. Justice Murphy wrote the opinion for the majority holding the seizure was illegal because of the absence of a search warrant.

Although there was a lawful arrest Justice Murphy said it was "a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable," because of "the desirability of having magistrates rather than police officers determine when searches and

¹⁰³ *Id.* at 15.

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *Id.* at 17.

¹⁰⁶ 334 U.S. 699 (1948).

seizures are permissible and what limitations should be placed upon such activities.”¹⁰⁷ He emphasized that the agents had all the time and knowledge necessary to get a warrant and that the equipment was such that it could not easily be moved. He quoted what the Court said in the *Johnson* case above that no reason was “offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay.” He stressed the fact that Antoniole’s arrest and proximity to the proeprty was “a fortuitous circumstance which was inadequate to legalize the seizure.” “We do not believe,” he said “that the applicability of the Fourth Amendment to the facts of this case depends upon such a fortuitous factor as the precise location of Antoniole at the time of the raid.”¹⁰⁸ He went on to say that to search and seize without a warrant as an incident to a lawful arrest had “always been considered to be a strictly limited right” growing out of the “inherent necessities of the situation at the time of the arrest” and required more than “merely a lawful arrest;” otherwise, he said, the exception “swallows the general principle.” He commented briefly on the *Harris* case and pointed out some factual differences with the present case especially the fact that in the present, in contrast to the *Harris* case, the location and precise nature of the articles seized were known so that a warrant could easily have been obtained. He cited also the case of *Taylor v. United States*¹⁰⁹ where prohibition agents on smelling liquor in a garage and seeing what was thought to be cases of it in the garage broke in and seized the liquor only to have their conduct declared illegal because they had plenty of time to get a search warrant but did not do so. Effective operation of government he concluded “could hardly be embarrassed by the requirement that arresting officers who have three weeks or more within which to secure the authorization of judicial authority for making a search and seizure should secure such authority and not be left to their own discretion as to what is to be searched and what is to be seized.”¹¹⁰

Chief Justice Vinson wrote a dissenting opinion concurred in by Justices Black, Reed and Burton. After reviewing the facts of the case and pointing out that the majority agreed that the arrest

¹⁰⁷ *Id.* at 705.

¹⁰⁸ *Id.* at 708.

¹⁰⁹ See second installment (1953), 41 Ky. L. J. 409.

¹¹⁰ 334 U.S. 699, 710 (1948).

of Antoniole was lawful, he said that the rule was well established that reasonable searches and seizures could be made at the time of a lawful arrest, quoting again the statement from the *Agnello* case which he had used in his majority opinion in the *Harris* case. He pointed out that here the things seized were in plain sight and said that "to insist upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect, serves only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties."¹¹¹ He considered the *Taylor* case relied on by the majority and said that in that case no one was in the garage and there was no reason to think there was and that the agents did not lawfully enter to make an arrest. It furnished no support he thought for the majority's position. He then commented on Justice Murphy's emphasis on the fact that Antoniole's proximity to the articles seized was a "fortuitious circumstance which was inadequate to legalize the seizure" by saying "we suppose that any arrest of a party engaged in the commission of a felony is based in part upon an element of chance. Criminals do not normally choose to engage in felonious enterprises before an audience of police officials."¹¹² He challenged the use made of the *Johnson case* by the majority. There he pointed out the Court held the arrest was also unlawful, and that of course under such a circumstance a search and seizure would also be unlawful. He closed by saying "we believe that the result reached today is not consistent with judicial authority as it existed before the adoption of the Fourth Amendment nor as it has developed since that time. Nor do we, that the decision commends itself as adopted to conserve vital public and individual interests . . . at best, the operation of the rule which the court today enunciates for the first time may be expected to confound confusion in a field already replete with complexities."¹¹³

It seems obvious that this decision is inconsistent with the principle laid down in the *Harris* case although the majority opinion did not clearly say so. Justice Murphy contented himself by point-

¹¹¹ *Id.* at 714.

¹¹² *Id.* at 715.

¹¹³ *Id.* at 716.

ing out the factual differences between the two cases and said he would "leave it to another day" to test the Harris principle. In a sense both cases were out of line with past law. In the *Harris* case there was a new and tremendously important extension of the right without a warrant to search the "place" where a lawful arrest is made. In the *Trupiano* case the Court in ruling out the seizure of material in plain view and being used at the time of arrest in the commission of the crime went contrary to its own decision in the *Marron* case and to the rule generally applied in English and American courts that officers making a lawful arrest can seize the instruments of crime being used at the time of arrest.

In *McDonald v. United States*¹¹⁴ petitioners were convicted for running a lottery known as the numbers game in Washington, D. C. McDonald lived on the second floor of Mrs. Terry's rooming house and had been under observation by police for sometime. On the afternoon of the arrest the police heard the sound of adding machines, often used in the numbers game. Assuming that the game was in operation they surrounded the house. One of them entered through a window to the landlady's apartment and let the others in. They searched the rooms on first floor and on the second floor an officer stood on a chair in the hall and looked through the open transom into McDonald's room. He saw petitioners at a table with adding machines, numbers slips, and money piled on the table. He told McDonald to open the door which he did. The officers arrested both petitioners and seized the equipment being used. McDonald challenged the legality of the seizure of the equipment and its use as evidence.

Justice Douglas wrote the majority opinion holding the search and seizure illegal. The government justified the search as incident to a lawful arrest. Justice Douglas took the same position that was taken by the Court in the *Trupiano* case that "a search without a warrant demands exceptional circumstances." There were no such circumstances here he thought. Since the police had been watching these men for months there was no reason except inconvenience and delay for not getting a warrant. The suspects were not trying to escape, nor destroy the property seized, and an officer could have been left on guard while others got a search warrant. He repeated again that the Fourth Amendment "inter-

¹¹⁴ 335 U.S. 451 (1948).

posed a magistrate between the citizen and the police." This was done he said "not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."¹¹⁵

Justice Burton, with Chief Justice Vinson and Justice Reed concurring, wrote a dissent. He took the position that this was a clear case of lawful arrest for an offense committed in the presence of the officers and "the seizure of the instruments of the crime which then were in plain sight. There was no search. There is, therefore, no issue as to the need for a search warrant." He went on to explain that the petitioners being tenants "had no right to object to the presence of officers in the hall of the rooming house," and the observance by the officers of the commission of the crime "justified the immediate arrest of those engaged in it without securing a warrant for such arrest."¹¹⁶

The difference between the majority and minority opinion in this and in the preceding case is chiefly a difference as to the importance of requiring officers to secure a search warrant when it is reasonably possible to do so instead of proceeding on their own discretion. Justice Burton would seem to be on sound ground in his position that the petitioners could not object to the presence of the police in the hall. Mrs. Terry no doubt could have made legal objection but did not do so, and under the law, as has already been shown, the instruments of crime in plain sight when a lawful arrest is made may be seized without a warrant. Here the arrest would seem to be lawful since the petitioners were caught in the act. Justice Douglas for the majority refused to examine the logic used by the government and the minority of the Court because he said, "We reject the result." As a result of this and the preceding case it would seem that the majority of the Court had embraced the rule that a search warrant where it was practicable to get one was a requirement for a search for and seizure of evidence whether or not there was a lawful arrest, at least where officers had plenty of opportunity to get one.

¹¹⁵ *Id.* at 456.

¹¹⁶ *Id.* at 462.